

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

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4 RAMA SOU; TAI BUI; and SCOTT  
5 ZIMMERMAN,

6 Plaintiffs,

7 v.

8 MICHAEL BASH; JEREMY BASH;  
9 BERKLEY ENTERPRISES, INC.;  
10 PEPPERDINE ENTERPRISES, INC.;  
11 NINETY-FIVE FORT APACHE COMPLEX,  
12 LLC; and ROYAL VIEW, LLC,

13 Defendants.

Case No. 2:15-cv-00698-APG-VCF

**ORDER DENYING MOTIONS FOR  
SUMMARY JUDGMENT**

(ECF Nos. 103, 105)

12 In 2010, defendants Michael and Jeremy Bash pitched plaintiffs Rama Sou, Tai Bui, and  
13 Scott Zimmerman, on investing in two companies that owned property in Las Vegas: Ninety-Five  
14 Fort Apache Complex, LLC (Fort Apache) and Royal View, LLC (Royal View). The defendants  
15 allegedly told the plaintiffs of their intent to develop the properties on a certain timetable. All  
16 three plaintiffs invested in Fort Apache, and Sou and Bui invested in Royal View, for a total of  
17 \$300,000. The properties remain undeveloped.

18 In this lawsuit, the plaintiffs allege fraudulent inducement, false promise, and negligent  
19 misrepresentation. They move for summary judgment as to Jeremy Bash, arguing he made  
20 specific representations about construction plans (pursuant to which they made their investments)  
21 that were false because the properties remain undeveloped. The defendants respond that Bash's  
22 representations were not false, as the defendants intended (and still intend) to develop the  
23 properties but have been stymied by politics and a bad economy. Further, the defendants contend  
24 that optimistic statements by Bash about the properties are not actionable. Bash moves for  
25 summary judgment on the claims against him on these same grounds.

26 The parties are familiar with the facts of this case so I will not repeat them here except  
27 where necessary. I deny the plaintiffs' motion for summary judgment. There are genuine  
28

disputes whether Bash's statements about the properties were false or negligently made. I also deny Bash's motion for summary judgment as untimely. Even if I considered it, disputed facts would lead me to deny the motion.

## **I. ANALYSIS**

Summary judgment is appropriate if the pleadings, discovery responses, and affidavits demonstrate "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). I view the evidence and draw reasonable inferences in the light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenck, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

### **a. Fraudulent inducement**

Under Nevada law, the plaintiff must prove the following to sustain a claim of fraudulent inducement:

(1) A false representation made by the defendant; (2) defendant's knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation.

*Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1386 (Nev. 1998). "Fraud is never presumed; it must be clearly and satisfactorily proven." *Havas v. Alger*, 461 P.2d 857, 860 (Nev. 1969).

The plaintiffs argue that Bash represented to them in 2010 that the defendants were seeking final investments on the Fort Apache property and that a retail plaza would be

1 constructed within eighteen months. The plaintiffs also argue that the defendants represented that  
2 the Royal View property would be developed as a commercial property with construction  
3 commencing “immediately.” ECF No. 103 at 8. Yet both properties remain undeveloped.  
4 According to the plaintiffs, these facts show that Bash’s representations in 2010 must have been  
5 false and that Bash intended to deceitfully induce them into investing in companies he knew  
6 would not develop the properties.

7 Bash contends that any statements by him were mere puffery, which is not actionable as a  
8 misrepresentation. He also argues that at the time he was pitching the property to the plaintiffs,  
9 the defendants intended to develop and rezone the properties, so this representation was accurate  
10 at the time it was made. Bash contends that economic and political difficulties resulted in the  
11 defendants’ inability to develop the properties on their intended timetable.

12 The plaintiffs have not met their burden of demonstrating the absence of disputes of  
13 material fact regarding whether Bash’s statements about the development plans were false when  
14 made and that the defendants never intended to develop the properties. The plaintiffs do not point  
15 to any evidence showing that Bash’s 2010 statements about the plans to construct the properties  
16 were false. Meanwhile, in Bash’s response to interrogatories he states that the intent was to  
17 commercially develop the properties but this intent has been “put on temporary hold.” ECF  
18 No. 103-5 at 5–6.

19 The fact that the properties were not developed on the original timetable does not on its  
20 own prove fraud. Therefore, I deny the plaintiffs’ motion for summary judgment on the  
21 fraudulent inducement claim.

#### 22 **b. Negligent misrepresentation**

23 Nevada has adopted the definition of negligent misrepresentation contained in the  
24 Restatement (Second) of Torts § 552:

25 One who, in the course of his business, profession or employment, or in any  
26 other action in which he has a pecuniary interest, supplies false information  
27 for the guidance of others in their business transactions, is subject to liability  
28 for pecuniary loss caused to them by their justifiable reliance upon the  
information, if he fails to exercise reasonable care or competence in  
obtaining or communicating the information.

1 *Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nev.*, 575 P.2d 938, 940 (Nev. 1978).

2 The plaintiffs make the same argument for negligent misrepresentation as fraudulent  
3 inducement. In response, the defendants argue that Bash made no false representations, the  
4 plaintiffs have not demonstrated any damages as a result of Bash's representations, and that Bash  
5 exercised reasonable care in communicating with the plaintiffs, as he honestly believed his  
6 representations were true.

7 The plaintiffs have not met their burden of showing an absence of genuine dispute  
8 whether Bash's representations were false and whether Bash exercised reasonable care or  
9 competence in communicating the information. The plaintiffs' argument relies primarily on the  
10 fact that Bash told them in 2010 that the properties would be developed in a certain amount of  
11 time, which has not come to pass. However, they point to no evidence showing the defendants  
12 did not intend to develop the properties as represented, or that Bash failed to exercise reasonable  
13 care or competence in representing the defendants' intent to develop the properties within  
14 eighteen months. Meanwhile, the defendants produced a lease agreement for the Fort Apache  
15 property and evidence of the successful rezoning of the Royal View property, as well as  
16 declaration testimony that efforts were and continue to be made to develop the properties at  
17 issue. ECF Nos. 105-1, 105-2, 105-8, 105-13. Because the plaintiffs have not met their  
18 evidentiary burden, I deny their motion for summary judgment on the negligent  
19 misrepresentation claim.

20 **c. False promise**

21 The plaintiffs also bring a claim for false promise, but their argument in their summary  
22 judgment motion consists only of a footnote stating that adjudication of either of the other claims  
23 would result in their prevailing on the false promise claim. The plaintiffs did not properly  
24 support their motion for summary judgment on this claim. LR 7-2(a). In addition, I am denying  
25 the motion for summary judgment on the fraudulent inducement and negligent misrepresentation  
26 claims. Therefore, I deny the plaintiffs' motion for summary judgment on this claim.

1                   **d. Bash’s motion for summary judgment**

2           In addition to opposing the plaintiffs’ motion for summary judgment, Bash asks for  
3 summary judgment in his favor on all claims. The plaintiffs respond that the magistrate judge  
4 ordered all dispositive motions be filed by March 20, 2017, and that this motion, filed on April 5,  
5 is untimely and should not be considered.

6           Under Federal Rule of Civil Procedure 16(b)(4), a scheduling order may be modified  
7 only for good cause. This good cause standard “primarily considers the diligence of the party  
8 seeking” to amend the order or file a motion after a scheduled deadline. *Johnson v. Mammoth*  
9 *Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992); *see also U.S. Dominator, Inc. v. Factory*  
10 *Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985) (holding a district court may deny as  
11 untimely a motion filed after the scheduling order deadline when no modification request has  
12 been made), *superseded by statute on other grounds*. “If [the] party was not diligent, the inquiry  
13 should end.” *Mammoth Recreations, Inc.*, 975 F.2d at 609.

14           At the pretrial conference on December 12, 2016, Magistrate Judge Ferenbach ordered  
15 that dispositive motions be filed by March 20, 2017. ECF No. 102. The plaintiffs timely filed  
16 their motion for summary judgment. Bash filed his response and motion for summary judgment  
17 on April 5, 2017. As a response to the plaintiffs’ motion for summary judgment, the brief was  
18 filed within the 21-day deadline. LR 7-2(b). However, as a dispositive motion for summary  
19 judgment, the brief was filed after the scheduled deadline with no explanation or request for  
20 extension.

21           Bash has failed to establish good cause for considering his motion for summary  
22 judgment, as he provides no explanation for the untimely filing or why it should still be  
23 considered. “A scheduling order ‘is not a frivolous piece of paper, idly entered, which can be  
24 cavalierly disregarded by counsel without peril.’” *Mammoth Recreations*, 975 F.2d at 610  
25 (quoting *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)). Therefore, I  
26 deny as untimely Bash’s motion for summary judgment.

1 Even if I were to consider the motion, I would deny it, as there remain genuine issues of  
2 material fact. Bash argues that he represented to the plaintiffs generally the defendants' intent to  
3 purchase, develop, and rezone the two properties. The plaintiffs have produced evidence,  
4 however, of more particular, apparently false, statements that induced their investment. For  
5 example, the plaintiffs state in affidavits that Bash informed them the defendants had already  
6 procured leases for the Fort Apache retail site with Trader Joe's, Seven-Eleven, and Circle K.  
7 ECF Nos. 103-1, 103-2, 103-3. These statements appear to be false, as Fort Apache states in its  
8 interrogatory response that the only tenant lease procured for the site was with Green Valley  
9 Grocery. ECF No. 103-7 at 5. A jury could find that the representations Bash made to the  
10 plaintiffs about secured tenants were false and made in order to induce their investment.  
11 Moreover, Bash's argument that he cannot be liable as the officer of a corporation is unavailing.  
12 *See Semenza v. Caughlin Crafted Homes*, 901 P.2d 684, 688 (Nev. 1995) ("An officer of a  
13 corporation may be individually liable for any tort which he commits . . .").

14 **II. CONCLUSION**

15 IT IS THEREFORE ORDERED that the plaintiffs' motion for summary judgment (ECF  
16 No. 103) is **DENIED**.

17 IT IS FURTHER ORDERED that Jeremy Bash's motion for summary judgment (ECF  
18 No. 105) is **DENIED**.

19 DATED this 21st day of November, 2017.

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22 ANDREW P. GORDON  
23 UNITED STATES DISTRICT JUDGE  
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